IN THE

Supreme Court of the United States

October Term, 1941.

No. ~~233~~ 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and PACIFIC ELECTRIC RAILWAY COMPANY,

Appellants,

vs.

RAILWAY LABOR EXECUTIVES ASSOCIATION and BROTHERHOOD OF RAILROAD TRAINMEN,

Appellees.

BRIEF FOR APPELLANT PACIFIC ELECTRIC RAILWAY COMPANY.

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Opinions.

This is an appeal from an order of the District Court of the United States for the District of Columbia, sitting as a statutory three-judge court. The opinion of the lower court is reported in 38 F. Supp. 818. The opinion of the Interstate Commerce Commission involved herein is reported in 242 I. C. C. 9.

Jurisdiction of This Court.

This Court has jurisdiction of this appeal pursuant to Section 238 of the Judicial Code, Title 28 U. S. C. A., Section 345, the jurisdiction of the lower court being under 28 U. S. C. A., 41 (28) *et seq.* Pursuant to Rule 12, paragraph 1, appellants have filed their statement as to jurisdiction, and this Court has found October 13, 1941, that probable jurisdiction has been shown.

Statement of the Case.

This case presents the question of whether the Interstate Commerce Commission, in permitting a railroad to abandon unprofitable branch lines pursuant to Section 1 (18-20) of the Interstate Commerce Act, can impose conditions for the benefit of railroad labor displaced thereby. There is no attack upon the validity of the Commission's order authorizing the abandonment. Any questions of venue of the lower court have been waived, and the jurisdiction of the lower court is conceded under 28 U. S. C. A. 41 (28) *et seq.*

Appellant Pacific Electric Company filed an application with the Interstate Commerce Commission, docketed as No. 12643 under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act, 49 U. S. C. A., Section 1 (18-20), for a certificate of public convenience and necessity authorizing the abandonment of certain rail lines or parts of lines at various locations on its system in Los Angeles, Orange, San Bernardino and Riverside Counties, California [R. p. 3]. Hearings were had in which appellees appeared and at the conclusion of the hearings and the submission of briefs, there was issued a proposed report recommending the granting of the application in part [Exhibit B of the complaint, R. pp. 9-25]. Appellees excepted to this report in so far as it

failed to make provision for employees. On August 28, 1940, Division 4 of the Commission approved the issuance of the certificate permitting abandonment of some of the lines and denied permission to abandon as to others. In the course of its decision, the Commission held it had no authority to impose conditions for the protection of employees in abandonment proceedings. [242 I. C. C. 9 at 24, R. pp. 40-41.]

Following the decision of Division 4 of the Commission, appellees petitioned the entire Commission for rehearing, but this petition was denied [R. p. 6].

Appellees commenced this action in the District Court of the United States for the District of Columbia, No. 9011, on November 8, 1940, by complaint against *United States of America* and *Interstate Commerce Commission* [R. pp. 1-42]. By this action, appellees sought to have the Commission's order set aside in so far as it failed to impose conditions for the protection of employees. On November 9, 1940 the Interstate Commerce Commission extended the effective date of the certificate to November 17, 1940. On November 14, 1940 the Commission, in view of the pending suit to set aside the report and certificate, further amended the certificate to retain jurisdiction of the question of its authority to impose conditions for the protection of employees in abandonment proceedings pending final determination of the pending suit, but provided that in all other respects the report and certificate should be continued in full force and effect.

Answers were filed by defendant, United States of America [November 18, 1940, R. pp. 45-47], defendant Interstate Commerce Commission [November 25, 1940, R. pp. 48-50], and by defendant in intervention, Pacific Electric Railway Company [November 25, 1940, R. pp.

53-57]. Pacific Electric Railway Company intervened under Title 28, Section 45a of the U. S. C. A. and under the Rules of Civil Procedure for the District Courts of the United States. Upon stipulation of the parties and pursuant to order of the Court, appellees amended the prayer of their complaint as to the relief that was sought [R. p. 57].

At the hearing on November 25, 1940, the Court submitted the case on briefs and on March 6, 1941 announced its decision.

The lower court held that in so far as the report of the Interstate Commerce Commission denies consideration of the employes' petition for lack of power to entertain the same, it should be set aside and ordered that the Commission consider such petition and take such action as in its discretion shall be just and proper [R. pp. 59-68].

The order of the lower court was entered on April 2, 1941 [R. p. 68], and this appeal was taken by defendant, United States of America, defendant, Interstate Commerce Commission, and defendant in intervention, Pacific Electric Railway Company.

Specification of Assigned Errors.

The District Court erred:

(1) In holding that the Interstate Commerce Commission has authority, in abandonment cases, under the applicable provisions of the Interstate Commerce Act to impose conditions for the protection of displaced employees;

(2) In holding that because this Court held, in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208, that the Commission had authority to impose conditions for the protection of labor in consolidation cases, it has

the same authority under the abandonment provisions of the Act;

(3) In holding that the language used by Congress in the abandonment section (1 (18-20)) is entitled to the same interpretation as was given to the language in the consolidation section by this Court in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208;

(4) In holding that the legislative history of S. 2009, which culminated in the Transportation Act of 1940, "can throw little light on the extent of the discretionary authority since 1920 to impose conditions under section 1 (20)" and that the interpretation of section 1 (20) is so clear that resort to such extraneous matters is unnecessary;

(5) In failing to give weight to the fact that the Commission has consistently ruled, since the insertion in the Interstate Commerce Act of the provisions of section 1 (18-20) in the Transportation Act of 1920, that it has no authority in abandonment cases to impose conditions for the protection of employees affected by abandonments;

(6) In failing to give weight to the legislative history of the Transportation Act of 1940 showing that the question of affording protection to labor in abandonment cases was called to the attention of Congress, and Congress specifically refrained from giving the Commission such authority;

(7) In entering its final decree of April 2, 1941, setting aside that part of the Commission's report denying consideration of the employees' petition for lack of power, and in directing the Commission to consider said petition and take further action thereon, and

(8) In not dismissing the bill of complaint, as amended, at plaintiffs' costs.

SUMMARY OF ARGUMENT.

I.

The Interstate Commerce Act Does Not Authorize the Interstate Commerce Commission to Impose Conditions for the Benefit of Employees in Abandonment Cases.

A. The Act does not confer such authority as shown by the provisions of the Act and by the numerous decisions of the Interstate Commerce Commission.

B. Congress has indicated that it did not intend to confer such authority under the Act,

1. By failing to amend Section 1 (20) after the ruling of the Interstate Commerce Commission had been called to its attention by the Annual Report of the Commission in 1935 and in 1936;

2. By refusing to adopt an amendment introduced for the purpose of changing the interpretation of the Interstate Commerce Commission; and

3. By making a provision for railroad employees generally in the Railroad Unemployment Insurance Act.

ARGUMENT.

I.

The Interstate Commerce Act Does Not Authorize the Interstate Commerce Commission to Impose Conditions for the Benefit of Employees in Abandonment Cases.

A. THE ACT DOES NOT CONFER SUCH AUTHORITY AS SHOWN BY THE PROVISIONS AND PURPOSES OF THE ACT AND BY THE NUMEROUS DECISIONS OF THE INTERSTATE COMMERCE COMMISSION.

Appellees contend that Section 1 (18) and (20) confers on the Commission the authority to impose conditions for the protection of employees in abandonment cases. (See Appendix for Section 1, (18), (19) and (20).)

The first part of Section 1, subdivision (18), prohibits the extension of a line of railroad, or the construction of a new railroad, or the acquisition or operation of a new line of railroad, or extension thereof, or the engaging in transportation over or by means of such additional extended line of railroad until there has first been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require construction, or operation, or construction and operation, of such additional or extended line of railroad, and then there is added to that subdivision the following:

> "* * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In subdivision (20) this language is found:

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The Commission in the instant case adhered to the interpretation of Section 1 (18-20) of the Act as made for several years past.

For many years, the Interstate Commerce Commission has held that it does not have jurisdiction to make orders as to compensation of employees in abandonment cases.

Chicago Great Western Railroad Company Trackage (May 15, 1935), 207 I. C. C. 315;

Delaware River Ferry Co. of New Jersey Abandonment (April 17, 1936), 212 I. C. C. 580, 583;

Colorado & S. Ry. Co. Abandonment (Oct. 12, 1936), 217 I. C. C. 366, 381;

Pooling of Ore Traffic in Wisconsin and Michigan (Nov. 18, 1936), 219 I. C. C. 285, 294;

Chicago, Rock Island & Pacific Ry. Co. Trustees Abandonment (Nov. 22, 1938), 230 I. C. C. 341;

Copper River & N. W. Ry. Co. Abandonment (April 21, 1939), 233 I. C. C. 109;

Gulf, T. & W. Ry. Co. Abandonment (June 16, 1939), 233 I. C. C. 321, 331;

Quincy O. & K. C. R. Co. Abandonment and Control (July 12, 1939), 233 I. C. C. 471, 485-487;

Chicago, Springfield & St. Louis Receiver Abandonment (Feb. 12, 1940), 236 I. C. C. 765, 772;

Tonopah & Tidewater Railroad Company, Ltd. Abandonment (May 13, 1940), 240 I. C. C. 145, 150;

Chicago, M., St. P. & P. R. Co. Abandonment (Aug. 12, 1940), 240 I. C. C. 763, 771.

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In *Chicago Great Western Railroad Company Trackage*, 207 I. C. C. 315, it was said on pages 321-322:

"The applicant does not question our power to impose conditions in cases arising under section 1 (18) of the Interstate Commerce Act, but argues that such power is not unlimited and may not be exercised arbitrarily; that in public convenience and necessity cases the standards which we can follow in prescribing conditions are transportation standards and not standards of general welfare; and that unfortunate as the loss of positions by certain railroad employees may be, we are confined in our consideration of this case to the question of convenience and necessity to the public at Kansas City and elsewhere served by the applicant.

"In support of its arguments the applicant cites the decision of the Supreme Court of the United States in *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, in which the court held the imposition of a condition under Section 20a of the Interstate Commerce Act relating to the disposition of the funds created under a contract between stockholders and reorganization managers to be beyond our jurisdiction, and a decision of the same court in

Texas & P. Ry. Co. v. U. S., 289 U. S. 627, in which the court, in discussing alleged discrimination under Sections 2, 3 and 4 of that act, said, 'The act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare.'

"Section 1 (20) of the Interstate Commerce Act provides, in part, as follows:

" 'The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.'

"It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In *Wisconsin Telephone Co. v. Railroad Commission*, 162 Wis. 383, 'public convenience and necessity' was defined as 'a strong or urgent public need.' *Public-Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89.

In the present case the conditions sought have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad, with resulting unemployment. We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of

attempting to insure employment to the personnel of carriers whether or not the affected employees were needed."

The Commission, in the *Chicago Great Western Trackage* case, referred to a decision construing Section 5 of the Interstate Commerce Act, providing for combinations and consolidations of carriers, and continued (207 I. C. C. pp. 322-323):

"* * * The present proceeding differs from that one in that it is brought under the provisions of Section 1 (18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in Section 5 (4) proceedings we are of the view that under Section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from Section 5 (4) and read into Section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable. Our sympathy for employees and full realization of the hardship that may, and often does, result to them in the administration of the abandonment and other provisions of Section 1 (18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity."

The Commission in the *Chicago, Great Western Trackage* case concludes with the following statement (207 I. C. C. p. 323):

"From a consideration of the entire record in this proceeding we are of the opinion that we are without jurisdiction to impose conditions as sought by the

Brotherhood or conditions similar thereto looking to the accomplishment of the same purpose. It follows therefore that the decision of Division 4 herein must be affirmed. An appropriate order will be entered."

Chicago, Rock Island & Pacific Ry. Co. Trustees Abandonment (Finance Docket 11888, Nov. 22, 1938), 230 I. C. C. 341, involved the abandonment of a branch line about 67.47 miles in length, and also abandonment of trackage rights in two instances for a distance of 1.41 miles in one case and .16 mile in the other.

It was stated, regarding employees (p. 347):

"Argument on behalf of certain railroad labor organizations is to the effect that certain employees on the branch have no seniority rights on other lines of the applicants' system and that the proposed abandonment would result in their dismissal. However, our power to impose conditions in cases arising under Section 1 (18) of the Interstate Commerce Act does not extend to matters involving the disposition of labor. *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315."

The interpretation by the Interstate Commerce Commission of the abandonment provisions of the Interstate Commerce Act is reasonable and should be given great weight. A similar question was under consideration by this Court recently in the case of *United States of America, Interstate Commerce Commission, et al. v. American Trucking Association, Inc., et al.* (May 27, 1940), 310 U. S. 534, 84 L. Ed. 1345. In that case attempt was made to have the Interstate Commerce Commission exercise jurisdiction over "qualifications and

maximum hours of service of employees" in all branches of motor carrier service, under Section 204(a) of the Motor Carrier Act, whereas the Commission had interpreted the provision to mean that it could make such regulation only as to employees in operative service. The District Court of the United States, for the District of Columbia, had held that the interpretation by the Interstate Commerce Commission was wrong, and that it should proceed to make regulations for all motor carrier employees. This Court reversed the decision, and held that the construction of the Motor Carrier Act by the Interstate Commerce Commission was correct. This Court said (310 U. S. at 545, 84 L. Ed. at 1352):

> "It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act 'forty states had regulatory measures relating to the hours of service of employees' and every one 'applied exclusively to drivers or helpers on the vehicles'. In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division, it cannot be said that the word 'employee' as used in §204(a) is so clear as to the workmen it embraces that we would accept its broadest meaning."

This Court said further (310 U. S. at 549, 84 L. Ed. at 1354):

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted §204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations

involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

The case of *United States v. Chicago, M., St. P. & P. R. Co.* (1930), 282 U. S. 311, 75 L. Ed. 359 (cited by the Interstate Commerce Commission in the foregoing case of *Chicago Great Western Trackage*), was to enjoin the portion of an order of the Commission under Section 20a of the Interstate Commerce Act requiring, in accordance with a reorganization plan, the setting aside of a fund which included $1.50 per share of stock in the old company:

"set aside to provide for the compensation of the reorganization managers and the committees . . . and the fees and disbursements of their counsel and all depositaries and subdepositaries, any balance of said sum to be paid over to the new company as additional working capital or, if the reorganization managers in their discretion shall so determine, to be returned pro rata to the holders of certificates of deposit for stock." (282 U. S. 319, at 320; 75 L. Ed. pp. 361,362.)

The court said (282 U. S. p. 324; 75 L. Ed. p. 364):

"By Subdivision (3) of Section 20a the Commission is empowered to make its grant of authority to issue securities upon such conditions as the Commission may deem necessary or appropriate in the

premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, Union Bridge Co. v. United States, 204 U. S. 364, 384, 385, 51 L. Ed. 523, 532, 533) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities."

And further, on the same page:

"In the light of the foregoing, we examine the provision of the reorganization plan in respect of the special fund of $1.50 per share. That provision embodies a contract between the committees (voluntarily created by private persons), the managers, and such stockholders as shall elect to become depositors under the plan and shall advance, with other moneys for other purposes, the specified sum for the distinct and sole purpose of paying the managers and others for services rendered in behalf of and for the exclusive benefit of these depositors. Neither the old company nor the new one was a party or was privy to this contract. Neither the contract when made nor any of the parties to it, in respect of the contract, was subject to the jurisdiction of the Commission.

The court said (282 U. S. p. 327; 75 L. Ed. p. 365):

"The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law."

And the court concluded (282 U. S. p. 331; 75 L. Ed. pp. 367-368):

> "From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below."

It has been emphasized by this Court in numerous cases that the purpose of the Transportation Act of 1920, which first enacted the construction and abandonment provisions, Section 1 (18-22) was to insure an adequate system of transportation. (*Wisconsin Railroad Commission v. United States*, 257 U. S. 563, 66 L. Ed. 371] *New England Divisions Case*, 261 U. S. 184, 67 L. Ed. 605; *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 70 L. Ed. 578.) As said by this Court in the *New England Divisions Case*, 261 U. S. 184, 189, 67 L. Ed. 605, 609:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, 66 L. Ed. 371, 382, 22 A. L. R. 1086. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new pro-

visions took a wide range.* Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.** Upon the Commission, new powers were conferred and new duties were imposed.

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. * * *"

It is in the light of this background that the question in this case must be considered.

The decision of this Court in the case of *Interstate Commerce Commission v. City of Los Angeles*, 280 U. S. 52, 74 L. Ed. 163, is particularly apposite. In that case, as here, the Commission denied its power. It was asked to consider evidence introduced in that proceeding to determine whether the Commission should order the

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*Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469-474; see *Pennsylvania R. R. Co. v. United States Railroad Labor Board*, decided this day (261 U. S. 72, 67 L. Ed. 536), the provisions for raising capital, by new Government loans, sec. 210, pp. 468-9, by loans from the Railroad Contingent Fund (the recapture provision), sec. 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several States, sec. 439, pp. 494-496; the provision for consolidation of railways into a limited number of systems, sec. 407, pp. 480-482; provisions for securing adequate car service: *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 66 L. Ed. 671; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier; sec. 402, pp. 476-478; sec. 405, p. 479, secs. 412, 413, p. 483.

**Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, sec. 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines; sec. 402, p. 477; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, sec. 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 66 L. Ed. 371; *New York v. United States*, 257 U. S. 591, 66 L. Ed. 385; and to determine the division of joint rates.

railroads serving the City of Los Angeles to build and use a new passenger station in that city. The Commission held that it was without authority to require the construction of a new union station (100 I. C. C. 421). By petition for writ of mandamus the correctness of this conclusion was tested in the District Court of the District of Columbia, and ultimately reached this Court, where the sole question was whether the Commission had jurisdiction to order the construction of a new union station. In holding that the Commission was correct in refusing to assume jurisdiction, the court used language which we think is equally applicable here. The court said (280 U. S. 52. 68, 74 L. Ed. 170):

> "Withou more specific and express legislative direction than is found in the Act we can not reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. * * * It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. * * *
>
> "* * * A proper statute would seem to require detailed directions and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope. * * *

"To attribute to Congress an intention to authorize the compulsory establishment of union passenger stations the country over, without special mention of them as such, would be most extraordinary. The general ousting from their usual terminal facilities of the great interstate carriers would work a change of title and of ownership in property of a kind that would be most disturbing to the business interests of every state in the country.

"* * * If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. * * *"

It is significant that in this case the Court was considering, among other provisions, Sections 1 (18) and (20), which are involved here.

The Commission is a creature of Congress, operating under delegated powers, and its jurisdiction is only that conferred upon it by law.

Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248, 76 L. Ed. 273.

Its sphere is the regulation of carriers and, within the limits of its delegated powers, the Commission is supreme. The Commission's field is circumscribed by the language of the various acts under which it operates. Despite its great powers and multitudinous duties, it has no authority other than that conferred upon it by Congress. Any

attempt to exercise power in excess of that so delegated is void.

Interstate Commerce Comm. v. C. N. O. & T. P. Ry. Co., 167 U. S. 479, 510, 42 L. Ed. 243, 257;

Harriman v. Interstate Commerce Comm., 211 U. S. 407, 53 L. Ed. 253;

Southern Pacific Co. v. Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283;

United States v. L. & N. R. R. Co., 236 U. S. 318, 59 L. Ed. 598;

United States v. Pennsylvania R. R. Co., 242 U. S. 208, 61 L. Ed. 251;

Interstate Commerce Comm. v. Los Angeles, 280 U. S. 52, 68, 74 L. Ed. 163, 170.

In *Interstate Comm. Comm. v. Chicago G. W. Ry.*, 209 U. S. 108, 118, 52 L. Ed. 705, 712, this Court said:

> "It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. * * *"

The Interstate Commerce Commission was created for the purpose of supervising the public use to which the property of carriers is dedicated.

The abandonment provisions of (18) to (20) of Section 1 of the Interstate Commerce Act were enacted to have someone in position to determine whether or not the continuance of a railroad or a part of a line of railroad was justified by the traffic handled thereover, in view of

the fact that such continued operation would constitute a drain on the balance of the system and be operated at the expense of the other users of the system, even though such other users of the system received no benefit whatever from the line sought to be abandoned and thereby be an undue burden upon interstate commerce.

In cases of abandonment, the question is will the continued losses being experienced by the lines sought to be abandoned jeopardize the service then being rendered to the users of the railroad over the balance of its system.

In other words, in abandonment cases the question is will the inconvenience that must necessarily be suffered by the then users of the lines sought to be abandoned overbalance the greater convenience of the general users of the service of the railroad that is to be financially protected by such proposed abandonment.

The provisions (18) to (20) of Section I of the Interstate Commerce Act concerning extensions were enacted to have someone pre-judge and determine whether or not a proposed extension was justified, having the financial position of the carrier in mind. They were put in to stop improvident extensions. They were to prevent undue burdens on interstate commerce.

In cases of extensions of railway, the question is whether the traffic to be served will produce the costs of service or whether such service will be an unreasonable drain upon the balance of the system, and thereby be an undue burden on interstate commerce.

Appellees place great reliance upon the decision of the Supreme Court in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208. In that case the Supreme Court was construing Section 5 (4) of the Interstate Commerce Act,

which contained the following provision (see Appendix for all of Section 5(4)):

> "If * * * the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable*, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control * * * will promote the *public interest*, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon the terms and conditions and with the modifications so found to be *just and reasonable*." (Italics supplied.)

It is important to note that in the *Lowden* case the decision of this Court was in accord with the repeated interpretation of the Interstate Commerce Act as made by the Commission. In other words, this Court confirmed the construction arrived at by the Commission, that it had jurisdiction of employee protection under Section 5 (4) of the Act. As long ago as 1935 the Commission, in the *Chicago Great Western* case (207 I. C. C. 315), distinguished between its powers under Section 5 (4) to provide for employees as a part of the *public interest*, and the limitation of its powers as to public convenience and necessity in abandonment proceedings under Section 1 (18-20) of the Act. The Commission's interpretation should be confirmed in the instant case as it was in the *Lowden* case.

The lower court in this case, 38 Fed. Supp. 818, based its decision almost entirely on the *Lowden* case. There are a number of distinguishing features between this case and the *Lowden* case which the lower court failed to recognize. One of these is the difference in the language

used in Section 1 (20) from that used in Section 5 (4)(b). It will be hereafter shown that public convenience and necessity is not a broad enough term to provide for the protection of employees, and the general theory of the *Lowden* case that the purpose of the Transportation Act of 1920 may be carried out by providing for the protection of dismissed employees under the general phase "will promote public interest," does not apply where the phrase "public convenience and necessity may require" is used. A further distinction between the present case and the *Lowden* case which is not recognized by the lower court is the fact that, as stated above, the *Lowden* case merely upheld the decision of the Interstate Commerce Commission, whereas the lower court in this case ruled contrary to the numerous decisions of the Interstate Commerce Commission.

A further ground for distinguishing this case from the *Lowden* case is the fact that in consolidation cases it had been almost universally agreed both between labor and management that it was proper to impose conditions for the protection of dismissed employees.

On this question it was stated in the *Lowden* case, 308 U. S. at 234, 84 L. Ed. at 215:

> "As was pointed out by Commissioner Eastman in his concurring opinion in this case the protection afforded to employees by the challenged conditions is substantially that provided in event of consolidation by an agreement entered into in May, 1936, between 219, the great majority, of the railroad lines of the country, and 21 labor organizations. He also directed attention to the fact that the Committee of Six, three of whom were railroad executives, in their report to the President of December 23, 1938, recommended that the federal agency passing upon railroad con-

> solidation 'require as a prerequisite to approval a fair and equitable arrangement to protect the interests of . . . employees,' and that this report had been approved by the directors of the Association of American Railroads."

Neither the agreement of May, 1936, nor the recommendations of the Committee of Six referred to in the *Lowden* case above contained anything with regard to the protection of dismissed employees in abandonment proceedings. In fact, this controversial question was expressly not considered.

A further ground for distinguishing this case from the *Lowden* case is the fact that Congress had impliedly adopted the construction of the Interstate Commerce Commission to the effect that it has no authority to impose conditions for the protection of employees under Section 1 (20) as is more fully set forth in "B" of this brief.

The lower court in its opinion dismissed this point by saying that Section 1 (20) was unambiguous and therefore nothing but the language of the statute itself could be considered in interpreting its meaning. The court said (38 Fed. Supp. at page 823):

> "Indeed, we think the interpretation so clear that resort to such extraneous matters is unnecessary."

It cannot reasonably be said that the language of Section 1 (20) clearly provides the authority for providing for the protection of employees in abandonment cases in view of the fact that the Interstate Commerce Commission had ruled favorable to the appellants' contentions in numerous contested cases heretofore referred to prior to the decision of the lower court.

As a matter of fact, this Court in the *Lowden* case considered many circumstances outside of the language of the statute itself in reaching its decision, and inferentially indicated that the language of Section 5 (4)(b) was not clear and that such extraneous matters were necessary in order to determine its interpretation. In considering such matters as were considered in the *Lowden* case, the conclusion is almost inescapable that the rulings of the Interstate Commerce Commission on this question under Section 1 (20) should be sustained as they were under Section 5 (4)(b) in the *Lowden* case.

The fundamental policy stated in the Transportation Act of 1920 and referred to in the *Lowden* case which was applicable to consolidations does not apply in abandonment cases. The fundamental purpose of the Transportation Act of 1920 was to provide for consolidations of railroads. That there is a fundamental distinction between consolidations and abandonments is pointed out in the supplemental brief of appellees filed in the lower court where it is stated on page 15:

> "Apparently it has been felt by many that a facilitation of consolidations by rail carriers is a policy likely to strengthen the industry. No corresponding idea appears to have been expressed in connection with abandonments. The general question was not considered by either the Committee of Three or the Committee of Six. As far as the protection of employees affected by abandonments is concerned, the Committee of Six had no suggestion to make. The reason is not hard to find. The Washington Job Protection Agreement does not cover cases of abandonment. The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management

and railroad labor. It was one of those questions of 'labor relations' which, as stated by the Committee of Six in its report, found no place in its recommendations."

As stated by the Interstate Commerce Commission and supported by numerous decisions, there is a distinction between *public interest* as used in Section 5 (4), and *public convenience and necessity* as used in Section 1 (18). The fact that the Commission can attach conditions for the protection of labor in one case, while it may not in the other, is entirely logical.

The terms and conditions which the Commission may attach to an order authorizing consolidation, etc. under Section 5(4) of the Act are those which it may find to be *"just and reasonable"* in view of the *public interest*. This gives the Commission very wide latitude in the performance of its delegated powers. It is very different from the restricted powers of the Commission under Section 1 (20) to attach to its certificate "such terms and conditions as in its judgment the public convenience and necessity may require."

The term "public convenience and necessity" has been in general use in the various states and by the United States for many years as designating the interest of the people who use the public service; who use the transportation service in this case. When this phrase "public convenience and necessity" is used, it is plain that this is a limitation upon the authority vested in the Commission. If it were intended that the Commission should have more general authority under various phases of matters of "public convenience and necessity," Congress would have said so. It cannot be presumed that the Legislative Body meant something which it did not say.

The Commission had occasion to consider the effect on employment of abandonment, and the relation of the *Lowden* case thereto, in the recent case of *Chicago, Springfield & St. Louis Ry. Co. Receiver, et al., Abandonment,* 236 I. C. C. 765 p. 772, decided February 21, 1940. It is therein stated:

> "In the event that the application should be granted, the labor organizations ask that we attach to our certificate a condition requiring that any other railroad taking over any part of the property within one year after operation has ceased shall contribute a definite amount to the benefit of the unemployed Chicago, Springfield & St. Louis workers in the ratio borne by the revenue now produced on the property taken over to the whole revenue of the entire property. We think it obviously improper for such a condition to be imposed upon an unknown purchaser not a party to the proceeding, and that its only effect would be to discourage any purchase of the property for continued operation, so that there would be no benefit to the employees. These protestants also rely on the decision of the Supreme Court of the United States in *United States v. Lowden,* 308 U. S. 225, in urging that the welfare of employees must be considered in abandonment proceedings, but that decision involved different provisions of the statute. As to our lack of power to attach conditions for the protection of employees in abandonment proceedings, we refer to one determination in *Chicago G. W. R. Co. Trackage,* 207 I. C. C. 315."

The conclusions thus expressed are sound, and are in accord with the authorities construing "public convenience and necessity" over a long period of time. It is well established that public convenience and necessity refers to the needs of the public served or proposed to be served.

The California Railroad Commission, in the case of *In the Matter of the Application of Santa Clara Valley Auto Line, etc.*, decided in 1917, reported in Volume 14, Opinions and Orders of the Railroad Commission of California, page 112, said, on page 118:

> "As has been noted, section 5 of the Act of May 10, 1917, provides in part that no transportation company shall commence operations unless it has first secured from the Railroad Commission a certificate declaring 'that public convenience and necessity' require such operation. This is the only test prescribed by the statute. Accordingly, when application is made to the Railroad Commission for an order authorizing automobile stages to operate, the sole test which the Railroad Commission may apply is whether or not the convenience and necessity of the public require that the service as contemplated by petitioner shall be rendered."

The California Supreme Court said in *Oro Electric Corp. v. Railroad Commission* (1915), 169 Cal. 466, regarding certificate of public convenience and necessity for construction and operation of lines for the transmission and sale of electric current (p. 475):

> "The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public."

In the case of *Chicago, R. I. & P. Ry. Co. v. State, et al.* (Supreme Court of Oklahoma, 1926), 252 Pac. 849, the court said, in reversing the granting of certificate of public convenience and necessity for a bus line (p. 851):

> "Public is the opposite of private, and pertains to the people of a nation, state, or **community at large,** the general body indefinitely or as a whole or entirety. In determining whether public convenience and necessity require the operation of a motor carrier, we must consider the question in the light of the demands of the people of the community at large, or as a whole or entirety, in the territory affected by the proposed carrier."

This is followed with a discussion of the facts which show, clearly, that the court has in mind, in determining public convenience and necessity, the persons who use or will use the transportation, concluding with the following statement:

> "Some individuals—perhaps a considerable number—would be convenienced by the operation of the bus line; but it is clear from the record that, to the great body of the traveling public, it would be neither a convenience nor a necessity, much less 'a convenience *and necessity*', as contemplated by the act."

In *O'Keefe v. Chicago Rys. Co.* (Dec. 22, 1933), 188 N. E. 815 (Ill.) the court said at page 817:

> "The convenience and necessity required to support an order of the commission are those of the public and not of the individual or a number of individuals. Roy v. Commerce Commission, 322 Ill. 452, 153 N. E. 648."

It was held in *Department of Public Utilities, et al. v. McConnell, et al.* (Arkansas Supreme Court, June 5, 1939), 198 Ark. 402, 130 S. W. (2d) 9, 30 P. U. R. (N. S.) 53 at 56:

> "While it is true that under §43 of Act 324, p. 934, of 1935, the Department of Public Utilities is empowered to 'attach to the exercise of the rights granted by (a certificate of convenience and necessity) such terms and conditions in harmony with (the) act, as in its judgment the public convenience and necessity may require, 'we are of the opinion that such power of limitation relates to methods of construction and the quality and extent of service in relation to rates, etc., rather than to controversies between contending utility companies in respect of matters involving damages to their properties."

The Court said in *Re Dakota Transportation, Inc.* (April 17, 1940, S. D. Supreme Court), ... S. D. ....., 291 N. W. 589, 35 P. U. R. (N. S.) 442 at 446:

> "The convenience and necessity which the law requires to support an 'order for the establishment or extension of motor vehicle transportation service is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals, and this is the primary matter to be considered in determining what constitutes such public convenience and necessity in a particular case, and the propriety of granting a certificate to that effect.' 42 C. J. 687, §121."

In the case of *Village of Mantorville v. Chicago, Great Western R. Co.* (1934), 8 Fed. Supp. 791, the Court was considering the matter of abandonment of a certain line of railroad authorized by the Interstate Commerce

Commission, which was opposed by the Railroad and Warehouse Commission of Minnesota, and by the Village of Mantorville. The Court said on page 794:

> "Public convenience and necessity are not determined by a Commission merely to protect the railroad, but to protect interstate commerce from onerous burdens which may affect the efficiency and the ability of the carrier to perform its duty to the public."

It is reasonable to presume that Congress used the words "public convenience and necessity" when enacting Section 1 (18-20) as a part of the Transportation Act of 1920, in contemplation of its commonly understood meaning. Also, the fact that Congress left the wording unchanged during the years since 1920 indicates that it concurred in the interpretation repeated many times by courts and commissions.

As stated in the case of *Essex v. New England Telcg. Co.* (1915), 239 U. S. 313 p. 322, 60 L. Ed. 301, p. 306:

> "The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted."

Therefore, the Commission, in its long line of cases, has correctly construed its jurisdiction to be limited, under Section 1 (18), (19) and (20), to determining the public convenience and necessity of the public using the railroad service involved, as distinguished from the jurisdiction of the Commission under Section 5 (4) to provide such terms and conditions found to be just and reasonable to promote the public interest.

B. CONGRESS HAS INDICATED THAT IT DID NOT INTEND TO CONFER SUCH AUTHORITY UNDER THE ACT.

It has been shown that the phrase "such terms and conditions as in its judgment public convenience and necessity may require" in Section 1 (20) of the Act is for the protection of the public using the railroad as passengers or shippers and does not provide for the protection of employees. Further, it has been shown that the Interstate Commerce Commission in numerous decisions since 1935 has so interpreted this provision and that its interpretation is entitled to great weight.

It will now be shown that Congress has indicated that it did not intend to confer such authority under the Act.

1. By failing to amend Section (20) after the ruling of the Interstate Commerce Commission had been called to its attention by the Annual Report of the Commission in 1935 and in 1936;

2. By refusing to adopt an amendment introduced for the purpose of changing the interpretation of the Interstate Commerce Commission; and

3. By making a provision for railroad employees generally in the Railroad Unemployment Insurance Act.

In such manner Congress has shown that it has accepted and adopted the interpretation of the Interstate Commerce Commission. The law applicable to the construction of a statute in such a situation is summarized in the following cases:

United States v. American Trucking Associations, 310 U. S. 534 at p. 549; 84 L. Ed. 1345 (May 27, 1940), at page 1354:

"It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation. The first interpretation was made on December 29, 1937, when the Commission stated: '. . . until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations.' This expression was half a year old when Congress enacted the Fair Labor Standards Act with the exemption of §13(b) (1), 29 U. S. C. A. §213(b) (1). Seemingly the Senate at least was aware of the Commission's investigation of its powers even before its interpretation was announced. Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act."

Walker v. United States, 83 Fed. (2d) 103 (March 30, 1936), at page 106:

"The determination of the construction of the meaning of congressional acts is a judicial function. This function and duty is so entirely and purely judicial that it is beyond the power either of the executive (Manhattan General Equipment Co. v. Commissioner, 56 S. Ct. 397, 80 L. Ed. decided February 3, 1936; Louisville & N. R. Co. v. United States, 282 U. S. 740, 757, 51 S. Ct. 297, 75 L. Ed. 672) or of the Congress (Levindale Lead & Zinc

Min. Co. v. Coleman, 241 U. S. 432, 439, 36 S. Ct. 644, 60 L. Ed. 1080; Koshkonong v. Burton, 104 U. S. 668, 678, 26 L. Ed. 886) to control.

"If the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute, and neither legislative nor executive construction nor both is of any aid or force. Massachusetts Mutual Life Ins. Co. v. United States, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; Louisville & N. R. Co. v. United States, 282 U. S. 740, 757, 51 S. Ct. 297, 75 L. Ed. 672; Iselin v. United States, 270 U. S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566. However, if the act is ambiguous (Massachusetts Mut. Life Ins. Co. v. United States, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; Louisville & N. R. Co. v. United States, 282 U. S. 740, 757, 51 S Ct. 297, 75 L. Ed. 672; United States v. Missouri Pac. R. Co., 278 U. S. 269, 281, 49 S. Ct. 133, 73 L. Ed. 322; Iselin v. United States, 270 U. S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566), the courts will, in their search for the proper meaning of the act, give consideration to a later legislative construction (New York, P. & Norfolk R. Co. v. Peninsula Exchange, 240 U. S. 34, 39, 36 S. Ct. 230, 60 L. Ed. 511) or to the construction by an executive for administrative or enforcement purposes (United States v. Hammers, 221 U. S. 220, 225, 226, 228, 229, 31 S. Ct. 593, 55 L. Ed. 710).

"Instances occur where both the executive department and Congress adopt the same construction. This usually happens where the courts 'presume' a congressional sanction of an executive construction from the situation that Congress repeats the statutory language without substantial change while the executive construction is existent and being applied in the administration of the earlier act. This 'presump-

tion' is based upon the suppositions that the Congress which enacted the later acts knew of the administrative construction and would have clarified the situation as to the later acts had it been dissatisfied with such construction. It is true that most of the decisions recognizing this *presumed* congressional sanction have been dealing with the construction of the later acts, as to which the situation is somewhat different, since those Acts might be regarded as passed in the light of the then existing executive construction, and therefore as having that construction in mind and adopting it as the meaning for the later acts. However, even that situation does not lessen the natural inferences that by such subsequent action Congress gave its approval to the executive construction of the same language in the earlier act concerning which that construction came into being. Massachusetts Mut. Life Ins. Co. v. United States, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; Murphy Oil Co. v. Burnet, 287 U. S. 299, 302, 307, 53 S. Ct. 161, 77 L. Ed. 318; Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 307, 51 S. Ct. 418, 75 L. Ed. 1049; Heiner v. Colonial Trust Co., 275 U. S. 232, 235, 48 S. Ct. 65, 72 L. Ed. 256; Provost v. United States, 269 U. S. 443, 458, 46 S. Ct. 152, 70 L. Ed. 352—being cases involving construction of the earlier act.

"The weight or force which the courts will, in their construction of an act, give to such executive or legislative constructions, has been variously phrased by the Supreme Court. Similarly, there is a variety of expression as to such weight and force where the court conceives the executive construction to be also approved by Congress. In such latter situation, it has been said that the executive construction has the 'force of law' (Hartley v. Commissioner, 295 U. S.

216, 220, 55 S. Ct. 756, 758, 79 L. Ed. 1399; Old Mission Portland Cement Co. v. Helvering 293 U. S. 289, 294, 55 S. Ct. 158, 79 L. Ed. 367); that it 'must be accepted' (Alaska Steamship Co. v. United States, 290 U. S. 256, 262, 54 S. Ct. 159, 161, 78 L. Ed. 302); that it 'will not be overturned except for very cogent reasons' (Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315, 53 S. Ct. 350, 358, 77 L. Ed. 796); that it would be given 'great weight, even if we doubted the correctness of the ruling' (Costanzo v. Tillinghast, 287 U. S. 341, 345, 53 S. Ct. 152, 154, 77 L. Ed. 350); that it will not be 'disturbed except for reasons of weight' (McCaughn v. Hershey Chocolate Co., 283 U. S. 488, 492, 51 S. Ct. 510, 512, 75 L. Ed. 1183); that 'were the matter less clear' the court 'should be constrained' to follow it (Poe v. Seaborn, 282 U. S. 101, 116, 51 S. Ct. 58, 61, 75 L. Ed. 239); that it will be followed 'when not plainly erroneous' (New York, New Haven and H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 402, 26 S. Ct. 272, 281, 50 L. Ed. 515). When the quotations in the above sentence are considered in connection with the issues and situations in which they were severally used, it would seem that a safe statement of this rule of construction is that, where a statutory provision is ambiguous, and the executive department which must apply and enforce it declares a construction (not in itself ambiguous, Burnet v. Chicago Portrait Co., 285 U. S. 1, 16, 20, 52 S. Ct. 275, 76 L. Ed. 587) for administrative purposes, and thereafter Congress re-enacts the provision without substantial change, the courts will accept that construction unless it be 'plainly erroneous'."

See generally the Annotation in 73 L. Ed. 322.

I. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Failing to Amend Section 1 (20) After the Ruling of the Interstate Commerce Commission Had Been Called to Its Attention by the Annual Reports of the Commission in 1935 and in 1936.*

The Commission's holding in the *Chicago Great Western* case, 207 I. C. C. 315, was called to the attention of Congress in the Commission's 49th Annual Report for 1935 from which we quote:

"FINANCIAL LOSSES OF RAILWAY EMPLOYEES.

"In proceedings under provisions of the interstate commerce act we issue certificates of public convenience and necessity authorizing railway common carriers to abandon existing facilities, or to unify their railway properties or operations. It follows as a consequence of such abandonments or unifications that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. An instance in which such consequence resulted from the use by one carrier of certain facilities of another, jointly with the latter, is given in our report in *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315. In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. This refers particularly to relocation or abandonment of shops. We recommend further statutory provisions to protect employees from undue financial loss as a consequence

of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

The first recommendation made to Congress for additional legislation in the same report reads:

> "1. That further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

In its 50th Annual Report for 1936, page 107, the Commission adhered to the recommendations made the prior year. Congress has amended the Interstate Commerce Act in several particulars since the Commission's decision in *Chicago G. W. R. Co. Trackage, supra,* decided May 15, 1935, namely on May 23, 1935 (49 Stat. L. 287); July 16, 1935 (49 Stat. L. 481); August 9, 1935 (49 Stat. L. 543); August 12, 1935 (49 Stat. L. 607); April 16, 1936 (49 Stat. L. 1212); July 5, 1937 (50 Stat. L. 475); August 25, 1937 (50 Stat. L. 809); August 26, 1937 (50 Stat. L. 835); June 23, 1938 (52 Stat. L. 1029); June 29, 1938 (52 Stat. L. 1236); September 18, 1940 (54 Stat. L. 898), and also by the Transportation Act of 1940, approved by the President on September 18, 1940. Nowhere in these amendments has Congress seen fit to specifically confer upon the Commission authority to impose conditions for the protection of labor in abandonment cases. Certainly Congress has had ample opportunity to grant this authority, called to its attention by the Commission in 1935 and again in 1936.

2. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Refusing to Adopt an Amendment Introduced for the Purpose of Changing the Interpretation of the Interstate Commerce Commission.*

It will now be our effort to show that in the Transportation Act of 1940, rewriting essential parts of the Interstate Commerce Act and conferring added authority on the Commission, Congress expressly refrained from conferring the authority which the appellees contend the Commission has had since 1920.

As above stated, the Transportation Act, 1940, was approved September 18, 1940, and constitutes a practical rewriting of the Interstate Commerce Act. This law had its antecedent in S. 2009, introduced in the Senate by Senator Wheeler in March, 1939.* No material change was made in the construction and abandonment provisions of the Interstate Commerce Act with respect to the question of power here involved. However, the consolidation and unification provisions, Section 48 of S. 2009, as introduced, contained in subsection 3(d) thereof, the following (with respect to consolidations, mergers, etc.):

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

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*The legislation is referred to in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208, and in *United States v. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345.

Extensive hearings were held on this bill by the Senate Committee on Interstate Commerce, of which Senator Wheeler was Chairman. During these hearings, Mr. George Harrison, President of the Railway Labor Executives' Association, one of appellees, and many other witnesses appeared and were fully heard. On Monday, April 3, 1939, Mr. Harrison appeared before the Committee and after defining a co-ordination of carriers as "a physical bringing together of the facilities without the merging of the corporate organizations" (p. 36), said:

> "Of course, if co-ordinations may be subsequently written into this bill over the objections of railroad labor, why, we would anticipate that the committee would look with favor upon the same considerations and protections being accorded the interest of labor that might be adversely affected pretty much along the same general approach as we had provided that labor is protected in consolidations when they are made."

And at page 38, the following occurs:

> "Senator Reed: Having run into your brotherhoods at different times in my career, I think I understand their approach, which again is an approach of maintaining employment as stable as possible; but if in the working out of this problem it became necessary or desirable to have unification and if the men who were displaced by unification or consolidation were taken care of by a reasonable adjustment, such as you now have with the management, would that not largely take care of the labor situation?
>
> Mr. Harrison: I think in the main, Senator—
>
> Senator Reed: Thank you, very much.
>
> Mr. Harrison (continuing).—that it protects labor.

Senator Reed: Thank you, very much. We all want to protect labor. There is no unfriendliness among us. I am one, if you please, who believes there is no answer to this railroad problem except consolidation or, prior to consolidation, a very substantial unification of facilities, so as to reduce the operating expenses and the cost of service down to a point where the railroads can sell more service."

At that time, neither Mr. Harrison nor any one else that we know of had any thought about extending the law to contain provisions to protect labor in abandonment cases. And when the bill passed the Senate on May 25, 1939, this provision, as a part of Section 49 (3)(c), relating to consolidations and unifications, read:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

When the bill came before the House, it was passed on July 26, 1939, with amendments. The corresponding section of the House Bill, (Section 5 (2)(e)) dealing with consolidations, mergers, etc. provided:

"(e) No consolidation, merger, purchases, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends, shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result in an increase of total fixed charges on funded debt, except upon a specific finding by the Commission that such an increase in a particular case would not be

contrary to public interest. The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected: *Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

This proviso was inserted on the floor of the House and has become known as the Harrington Amendment, after its proponent, Congressman Harrington. On July 29, 1939, the bill was sent to conference to adjust the differences between the House and Senate bills. While in conference, the Interstate Commerce Commission, through its Legislative Committee sent a communication to the Chairman of the House and Senate Committees, expressing the views of the Commission with respect to the provision as it passed the House. These views, printed by the House, stated:

"As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and

efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

The bill was reported by the conferees back to their respective Houses on April 26, 1940, and as so reported, eliminated the Harrington Amendment in its entirety. On May 9, 1940, the House again adopted a motion to recommit, and insisted:

"(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, of any contract, agreement, or combination, mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, *and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned,* the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval of authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment:

"Notwithstanding any other provisions of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (Italics ours.)

Again the bill was considered by the conferees with the revised Harrington Amendment, which it will be noted for the first time referred to the imposition of conditions

in abandonment cases, and the bill as recommitted was given careful consideration in conference. As reported out by the conferees to their respective legislative bodies, the conferees eliminated reference to abandonments and revised the Harrington Amendment to some extent, and then sent it back to the House and Senate. As revised by the conferees on the motion to recommit, the bill read with respect to the Harrington Amendment:

> "(f) As a condition of its approval, under this paragraph (2),* of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

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*Paragraph (2) refers to consolidations, mergers, leases, contracts to operate, etc.; it does not include abandonments.

It will be noted that reference to abandonment was eliminated. Despite vigorous opposition, the bill passed the House as reported by the conferees on August 12, 1940, and was sent to the Senate where the conference report was agreed to on September 9, 1940. The bill was signed by the President on September 18, 1940, and so far as the above paragraph is concerned, is now law.

In the meantime (on April 26, 1940) which was the same day that the Conference Committee first reported to their two Houses and eliminated in its entirety the so-called Harrington Amendment, Congressman Harrington took the significant action of introducing a separate bill in the House, known as H. R. 9563, to protect labor in abandonment and in other cases, the body of which reads:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division or traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting abandonments under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads involved in such transaction, or in the impairment of existing employment rights of said employees."

No action to our knowledge was taken by the House on this bill.

The following further references to this matter appear in the Daily Congressional Record (pages 3-4): Congressman Van Zandt, on the floor of the House, in speaking of the Harrington Amendment said:

> "That amendment will force the railroads to abandon certain lines, and abandonment means the loss of jobs. It causes me to wonder whether some of these gentlemen are speaking as the friends of railroad labor today or whether they are really the enemies of railroad labor." (Daily Congressional Record, July 24, 1939, p. 13714.)

In the Daily Congressional Record, May 9, 1940, p. 8964, Congressman Lea, the Chairman of the House Committee on Interstate and Foreign Commerce said:

> "When a railroad is abandoned its tracks are torn up and the investment is largely destroyed, and to apply the same test or requirement as to taking care of labor in abandonments as in cases of consolidation is entirely unwarranted.
>
> "What is the practical thing? What should we do for labor in those cases? Is it not fair to provide for taking care of them for an adjustment period of a reasonable time, but hardly right to take an indefinite responsibility for them for an unlimited time? If that is a good rule for railway employees, why is it not a good rule for the rest of the employees of the country? Can we go home to our farmers and say to a farmer, 'Because you have employed a man for a while without any specific period and you no longer have a job for him, for any reason, you are going to become responsible for supporting him after the reason for his employment has terminated'?
>
> "Certainly that is about as wild a proposition as this House was ever asked to approve."

And at page 8079 of the same record appears a telegram from the President of the Brotherhood of Railroad Trainmen, in which he states that "we shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations."

In the Daily Congressional Record of August 12, 1940, page 15582, Congressman Harrington from Iowa, the author of the Harrington Amendment inquired of Congressman Halleck, one of the House Conferees, as follows:

> "Mr. Harrington. Does it take care of the employees with respect to abandonments?
>
> Mr. Halleck. I do not understand that it does, but I may say to the gentleman from Iowa that when he first offered his amendment the amendment did not take care of abandonments."

On the floor of the Senate, as reported in the Daily Congressional Record for September 5, 1940, page 17513, the following coloquy between Senator Reed, one of the Senate Conferees, and Senator Mead, is of interest:

> "Mr. Reed. At times I have been representative and spokesman for the railroad brotherhoods in Kansas.
>
> "We have modified the original provisions of the bill. We have made provision for railroad labor in the so-called Harrington amendment—that is, the amendment which was called the Harrington amendment—which is satisfactory to all the operating brotherhoods, so far as I know. If there is any objection to it, I am not aware of it.
>
> "Mr. Mead. As I understand, they are practically united in favor of the bill.
>
> "Mr. Reed. Oh, yes."

If any conclusive answer were needed to the proposition that the Commission has no authority to impose conditions to benefit labor in abandonment cases, it appears to have been supplied when the proponent of such a plan introduced a bill to accomplish what he had in mind, which bill did not emerge from committee. And this, too, in the face of the fact that the *Lowden case*, which is the case that appellees contend supports this claim of authority, was decided on December 4, 1939, some four months prior to Congressman Harrington's separate bill for that purpose.

In view of this extensive legislative history of the labor proposals we feel entirely justified in saying that Congress had the question before it of extending the act's provisions so as to protect labor in other than consolidation and unification cases, and declined to give that authority to the Commission.

3. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Making a Provision for Railroad Employees Generally in the Railroad Unemployment Insurance Act.*

Congress has provided for the protection of dismissed railroad employees under the Railroad Unemployment Insurance Act, 45 U. S. C. A., Section 351 *et seq.* (effective June 25, 1938).

In 45 U. S. C. A., Section 363a, it is provided:

> "By enactment of this chapter Congress makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, . . ."

If Congress felt that the provisions of the Unemployment Insurance Act were inadequate in cases of abandonment, it certainly would have made a more explicit provision therefor than is found in Section 1 (20) of the Interstate Commerce Act. This is especially true in view of the fact that Congress has been informed by the Annual Reports of the Interstate Commerce Commission in 1935 and 1936 that Section 1 (20) did not confer upon the Commission authority to make provisions for employees in abandonment cases.

Conclusion.

There is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind the protection of displaced employees in abandonment cases. It has been shown that the language of the abandonment section (Section 1 (18-20) of the Interstate Commerce Act) is not broad enough to provide for such protection.

Since the enactment of these abandonment provisions in 1920, in numerous cases the Interstate Commerce Commission has held that these provisions do not authorize provisions for the protection of employees in abandonment cases. Congress itself has not seen fit to change this interpretation. In fact when the Interstate Commerce Act was being extensively amended in 1940, the Committee of Six appointed by the President expressly refrained from making any recommendation as to amendments to provide the Commission with such authority. No recommendation was made because this question was such a controversial one between management and labor that the Committee did not want to inject it into the proposed

amendments concerning which there was relative general accord.

It is clear that Congress has not intended to confer on the Interstate Commerce Commission the authority to impose conditions for the protection of employees in abandonment cases.

Therefore, the order of the District Court of the United States for the District of Columbia, sitting as a statutory three-judge court, should be reversed with directions to dismiss the complaint and enter judgment for defendants.

Respectfully submitted,

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APPENDIX.

Section 1 (18-20) of the Interstate Commerce Act, provides:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission

shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, act-

ing for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 5(4), prior to September 18, 1940, read:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock."

Now, the corresponding section reads:

"Sec. 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"'(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,

or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"'(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines, owned or operated by any other such carrier, and terminals incidental thereto.'

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public in-

terest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representativs of its or their employees."